

United States
Circuit Court of Appeals

For the Ninth Circuit.

A. H. FAVOUR and A. G. BAKER,
Appellants,
vs.

HARRY W. HILL, Receiver of Intermountain
Building and Loan Association,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Arizona.

FILED

JUL 23 1931

PAUL P. O'BRIEN,
CLERK

No. 9847

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

FAVOUR, BAKER AND CRAWFORD,
Bank of Arizona Building,
Prescott, Arizona.
Attorneys for Appellants.

BAKER and WHITNEY,
LAWRENCE L. HOWE,
Luhrs Tower,
Phoenix, Arizona.
Attorneys for Appellee. [3*]

[Title of District Court and Cause.]

PORTIONS OF "RECEIVER'S PETITION
FOR ORDER DETERMINING PREFER-
ENCES AND PRIORITIES AMONG CRED-
ITORS, SHAREHOLDERS AND INVEST-
ORS; AND FOR ORDER TO SHOW
CAUSE THEREON", THAT RELATE TO
CLAIM OF FAVOUR & BAKER, AS
SHOWN ON PAGES 7 AND 8 OF SAID
PETITION:

* * * * *

That on or about the 18th day of April, 1934, one Margaret Cobb recovered a purported judgment against the Association in the Superior Court of the State of Arizona, in and for the County of

*Page numbering appearing at foot of page of original certified Transcript of Record.

Yavapai, for the sum of \$1,000.00, with interest thereon at 6% per annum from January 1, 1934, until paid, together with court costs in the further sum of \$38.61. That upon obtaining said purported judgment the said Margaret Cobb took out special execution in aid thereof and the Sheriff of Yavapai County purported to sell an asset of the Association at sheriff's sale. That at said sheriff's sale and on April 30, 1934, the property of the Association so offered for sale was purportedly sold to one R. O. Barrett for \$1,064.06 in full payment and satisfaction of the judgment and costs, and thereupon satisfaction of said judgment was duly entered of record. That the law firm of Favour & Baker, composed of A. H. Favour and A. G. Baker, thereafter purported to purchase from R. O. Barrett the property the latter had acquired at said sheriff's sale. That the said firm of Favour & Baker are now asserting as against the Association such rights as Margaret Cobb had against the Association, if any, by reason of her original judgment. That the said claim and demand of Favour & Baker is hereby rejected and disallowed in its entirety.

[Endorsed]: Receiver's Petition for Order Determining Preferences and Priorities, etc. Filed Jul. 23, 1940. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [4]

[Title of District Court and Cause.]

ORDER OF REFERENCE

Receiver's Petition for Allowance and Disallowance of claims and to Determine Preferences and Priorities, if any, among and between creditors, investors, shareholders and others, having come on regularly for hearing on the 16th day of September, 1940, and good cause appearing therefor, and the issues involved thereon being voluminous, upon consideration thereof and the Court being fully advised in the premises,

It Is Ordered that said Petition and any and all claims against the Intermountain Building & Loan Association be referred to Neil C. Clark, Esquire, Heard Building, Phoenix, Arizona, as a Special Master in Chancery herein for hearing and determination, said Special Master to take evidence and proofs according to law; to examine the questions in issue thereon and to report from said evidence and proofs his findings of fact and conclusions of law in respect to each of said claims in these proceedings, and report his conclusions as to whether or not said claims should be allowed as against the Intermountain Building and Loan Association, the priorities and the amounts thereof.

It Is Further Ordered that said Special Master shall make a report to the Court of his action in the premises and shall give notice to all persons whose claims are presented to him of the filing of such report and shall advise them that excep-

tions thereto must be filed with the Clerk of this Court within ten (10) days from the filing of his report.

It Is Further Ordered that with respect to the matters herein referred to said Special Master he shall have all the powers conferred upon a Master by Rule 53 of the Federal Rules of Civil Procedure.

Dated at Phoenix, Arizona, this 16th day of September, 1940.

DAVE W. LING

Judge [5]

[Endorsed]: Filed Sep 16 1940 Edward W. Scruggs, Clerk United States District Court for the District of Arizona By Gwen J. Ballard, Deputy Clerk. [6]

[Title of District Court and Cause.]

PORTIONS OF "REPORT OF SPECIAL MASTER" THAT RELATE TO NOTICE GIVEN BY THE SPECIAL MASTER TO CREDITORS, AS SHOWN ON PAGES 1 AND 2 OF SAID REPORT.

To the Judges of the District Court of the United States, for the District of Arizona:

Comes now Neil C. Clark, as Special Master appointed by interlocutory decree entered herein on the 16th day of September, 1940, and respectfully reports as follows:

That on the 23rd day of July, 1940, Mr. Harry W. Hill, as Receiver of the Intermountain Building & Loan Association filed herein his report of the claims of creditors, investors, shareholders, and others, aggregating approximately 3012 claimants against the Association, and with said report filed a petition praying for an order of this Court for the allowance or disallowance of each of the several claims filed and a determination of the preferences and priorities, if any, among the creditors, investors, shareholders and others; and it appearing that the issues were involved and voluminous, it was ordered that said petition be referred to the undersigned as a Special Master in Chancery, to hear evidence in reference to said claims, and to examine the questions in issue arising from said petition, and to report his findings of fact and conclusions of law in respect to each of said claims, and whether or not said claims should be allowed, and the priority, if any, and amount of each of said claims.

On the 16th day of September, 1940, the undersigned was duly sworn to the faithful performance of his duties as Special Master and filed his oath in the office of the Clerk of this Court. Thereafter the undersigned fixed Thursday, October 3, 1940, at 10:00 o'clock a. m., at 124 North First Avenue, Phoenix, Arizona, as the [7] time and place for the first hearing under said order of reference, and caused notice of said hearing to be published in the Phoenix Gazette, a newspaper of general

circulation in the County of Maricopa, State of Arizona, published at Phoenix, Arizona, on the 28th day of September, 1940, and also caused a similar notice to be published on the 29th day of September in the Arizona Republic, likewise a newspaper of general circulation in the State of Arizona, proof of publication of which is hereto attached; and in addition thereto, written notice of said hearing was personally served upon Thomas W. Nealon and E. G. Monaghan, as attorneys for plaintiff herein, and others similarly situated, and said notice was sent by registered mail to each investor in contracts and securities of the Association whose claims were based upon contracts or certificates not bearing the security clause hereinafter mentioned; notice of said hearing also appeared in the news columns of the newspapers above mentioned and many other newspapers published in the states wherein the Association had actively engaged in business and where a great majority of the creditors of the Association now reside.

[Endorsed]: Report of Special Master Filed Dec 14 1940 Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [8]

[Title of District Court and Cause.]

MOTION THAT MASTER APPROVE JUDGMENT CLAIM OF A. H. FAVOUR AND A. G. BAKER; EXCEPTIONS TO REPORT OF RECEIVER; MOTION FOR SUBSTITUTION OF EXECUTORS.

Come now the above named claimants, pursuant to order of the Court dated September 16th, 1940, referring claims to a Special Master, and respectfully move and except as follows:

I.

This claim is based upon a judgment for One Thousand Dollars (\$1000.00), obtained by Margaret Cobb against the Intermountain Building & Loan Association in Cause No. 12971 in the Superior Court of Yavapai County, Arizona, on April 18th, 1934, before appointment of the Receiver herein, as said judgment was finally corrected and amended by order of February 28th, 1939. The judgment and order are attached to and made a part of the claim filed herein.

The judgment of April 18th, 1934, foreclosed a purported attachment of a mortgage in which the Intermountain Association was mortgagee, and a purported sale of the constructively attached property was made to R. O. Barrett, and a purported satisfaction returned by the Sheriff. The Arizona Supreme Court held void the attachment and sale, but not the judgment establishing the debt. in a later action (lower Court No. 13722) in which the Receiver and these claimants as assignees of the

judgment in favor of Margaret Cobb and R. O. Barrett, were parties. The Superior Court thereupon corrected the judgment in Cause No. 12971 to conform to the said decision of the Supreme Court, and eliminated the attachment and sale and all other proceedings thereafter, as null and void, leaving the judgment valid as establishing the debt. Margaret Cobb and R. O. Barrett thereafter again assigned to A. H. Favour and A. G. Baker, the claimants herein, the judgment as corrected; and their claim was filed, based upon said judgment establishing the debt.

II.

The Receiver, in his report filed herein, disallowing [9] the claim subject to such order as may be made by the Court, appears to base his rejection upon that part of the record (since held void) in said Cobb case, which shows the sale (now void) to R. O. Barrett and the consequent satisfaction (now void). The Receiver is unaware of, or does not take into consideration, the record since the void satisfaction. This later record sets aside the execution and all proceedings thereafter as void. The said Margaret Cobb did, on May 17th, 1934, make written assignment to R. O. Barrett of the judgment of April 18th, 1934, and in said assignment she states "said judgment debt and costs with interest thereon are still owing" to her, and she covenants that "the said judgment is in full force and effect and that the whole of the said sum of One Thousand Dol-

lars (\$1,000.00) with interest and costs remains owing thereunder”.

III.

This is a claim established as aforesaid by a judgment in the case in which the said defendant appeared and answered, and before a receiver was appointed. Neither the Intermountain Association nor the Receiver has paid any part thereof to any person at any time entitled to receive payment. No property of said defendant or the Receiver has been received by any person. The purported sale of the mortgage was set aside as void, and the defendant and the Receiver remained in possession of said mortgage as mortgagee, with full title thereto. Equity requires that the claim be approved with other judgment claims of its class.

Wherefore, these claimants respectfully move and pray that the Special Master:

First: Approve said judgment claim after such notice and hearing as may be accorded to creditor claimants;

Second: That said claim be given the preference allowed judgments in such cases.

Third: That Eva Favour, as Executrix, and Arthur G. Baker, as Executor, of the Estate of A. H. Favour, Deceased, be [10] substituted in the place and stead of the said A. H. Favour, now deceased, as one of the claimants herein.

FAVOUR, BAKER &
CRAWFORD

By A. G. BAKER

Attorneys for Claimants.

State of Arizona,
County of Yavapai—ss.

A. G. Baker, being first duly sworn, on oath, deposes and says:

That he is one of the attorneys for the Claimants making the above motions and exceptions, and is also one of said Claimants; that he has read the foregoing instrument and knows the contents thereof, and that the same is true in substance and in fact.

A. G. BAKER

Subscribed and sworn to before me this 25th day of September, A. D. 1940.

My commission expires September 7th, 1943.

[Seal] VERA VOGEL

Notary Public.

[Endorsed]: Filed Sep 27 1940 Edward W. Scruggs, Clerk United States District Court for the District of Arizona By Gwen J. Ballard Deputy Clerk. [11]

[Title of District Court and Cause.]

PORTION OF "REPORT OF SPECIAL MASTER" THAT RELATES TO CLAIM OF FAVOUR & BAKER. REPORT FILED DECEMBER 14th, 1940.

Judgment Creditors. (Page 41)

24. Claim of Favour & Baker. A. H. Favour and A. G. Baker have filed a claim for \$1,038.61

with interest at the rate of 6% from January 1, 1934, until paid. This claim is based upon a judgment obtained under the following circumstances: Mrs. Margaret Cobb, living in Yavapai County, Arizona, during the month of January, 1934, commenced an action against the Intermountain Building & Loan Association to enforce the payment of a matured certificate for \$1,000.00. Upon the commencement of the action the plaintiff caused a writ of attachment to be issued pursuant to which the Sheriff, in the manner hereinafter described, levied upon a mortgage of record in Yavapai County, given by Thomas Short and Catherina Short, his wife, as mortgagors, to the Intermountain Building & Loan Association as mortgagees. The levy, as shown by the Sheriff's return, was made in the following manner: "By serving a copy of said writ of attachment upon Thomas Short and Catherina Short, his wife, mortgagors; and that he caused a copy of said writ of attachment to be served upon the Intermountain Building & Loan Association, a Corporation, defendant, Mortgagee, and by causing a copy of this writ to be recorded in the office of the County Recorder of Yavapai County, Arizona."

[12]

Thereafter, on the 18th day of April, 1934, judgment was entered for the plaintiff as prayed for in the plaintiff's complaint, and further provided that: "The attachment heretofore made in this action upon all right of defendant in and to the real mortgage from Thomas Short and wife to de-

fendant in and to the real mortgage from Thomas Short and wife to defendant and recorded in Book 64 of Mortgages, page 153, in the office of the County Recorder, Yavapai County, be, and the same is hereby foreclosed, and that said attached property be sold on special execution in accordance with law and practice of this court." Thereupon an execution was issued and delivered to the Sheriff of Yavapai County, pursuant to which the following proceedings were had as shown by the Sheriff's return:

"Under, and by virtue of the foregoing Execution and Order of Sale, R. M. Robbins, Sheriff of Yavapai County, duly seized and levied upon all property described in said Execution and Order of Sale in the manner and form required by law. I duly noticed said property for sale in satisfaction of said judgment, as required by law, and the mandate of said writ, by posting three printed copies of said notice in said county, as required by law, one copy of said notice being posted at the door of the Court House of said County, all for twenty-one days next before said sale.

"On the 30th day of April, 1934, at the hour of 10 o'clock A. M., at the door of the Court House in said County, in the City of Prescott, all of said property mentioned, set forth and fully described in said Execution and Order of Sale, was duly offered for sale at public auction,

[13] in satisfaction of said judgment, pursuant to said notice and said writ. And at said sale all of the said property so described therein was duly struck off and sold to R. O. Barrett for the sum of Ten Hundred Sixty-four and 06/100 (\$1064.06) Dollars, he being the highest bidder, and that being the highest sum bid, and said sum so bid, and received being equal to the judgment and costs in this case, this Execution and Order of Sale is now returned fully satisfied.

“I have made and delivered to the said purchaser the legal certificate of sale, and have filed for record with the County Recorder of said county, a true copy or duplicate of said certificate.

“The receipt of plaintiff’s attorney in full satisfaction of said judgment is attached hereto and made a part of this return.

“Dated this 30th day of April, A. D. 1934.

R. M. ROBBINS,
Sheriff.

By. ROBT. V. BORN,
Deputy Sheriff.”

That attached to the Sheriff’s return was the original receipt of Favour and Baker, attorneys for plaintiff, referred to in the writ of which the following is a copy:

“Received of R. M. Robbins, Sheriff of Yavapai County, Arizona, the sum of Ten Hun-

dred Sixty-four and 06/100 (\$1064.06) Dollars in full payment and satisfaction of the judgment and costs in the foregoing Execution and Order of Sale, said sum being the amount [14] bid and received for the property this day sold at Sheriff's sale in satisfaction of said judgment, and said sum so bid and received for the property this day sold at Sheriff's sale in satisfaction of said judgment, and said sum so bid and received being evidenced and represented by the Certificate of Sale issued to the purchaser of said property.

Dated this 30th day of April, A. D. 1934.

Judgment	\$1,000.00
Interest	20.00
Attorney's fees
Taxes
Costs	38.61
Costs Accruing	5.45

Total	1,064.06
By Sale	1,064.06

Balance Due

Signed: FAVOUR & BAKER

Attorneys for Plaintiff''

On the 17th day of May, 1934 (i. e., seventeen days after the Sheriff's sale), Mrs. Margaret Cobb, as plaintiff and judgment creditor in cause No. 12971, executed, acknowledged, and delivered to R. O. Bar-

rett an instrument purporting to be an assignment of the judgment, in which, among other things, she recited:

“Now, therefore, this assignment of judgment, Witnesseth: That in consideration of the sum of \$10.00 and other valuable considerations to Mrs. Margaret Cobb, now paid by R. O. Barrett, receipt whereof is hereby acknowledged, the said Mrs. Margaret Cobb hereby assigns to the said R. O. Barrett all the benefit and the advantage of the said judgment with interest thereon, the costs and all moneys recoverable under the said judgment to hold the same to the said R. O. Barrett absolutely in the foregoing form to-wit: [15] \$1,000.00 with interest and costs and the said Mrs. Margaret Cobb hereby covenants with the said R. O. Barrett that the said judgment is in full force and effect and that the whole of said sum of \$1,000.00 with interest and costs remains owing thereunder. In witness whereof, Mrs. Margaret Cobb has hereunder set her hand the 17th day of May, 1934.”

That on or about the 30th day of April, 1934, for the consideration of \$1064.06, R. O. Barrett executed and delivered his written assignment of the Margaret Cobb judgment to A. H. Favour and A. G. Baker.

Thereafter, on June 2, 1936, Thomas Short and Catherina Short commenced an interpleader action

in the Superior Court of Yavapai County, naming R. O. Barrett, A. H. Favour, A. G. Baker, and H. S. McCluskey, the Receiver of the Association, and the Association, as conflicting claimants of the note and mortgage, and praying that they be compelled to interplead and litigate their several claims among themselves. Thereafter the issues were tried and a judgment entered, in which the trial court found that the note and mortgage levied upon under the attachment in the Margaret Cobb suit belonged to Favour & Baker, as the assignees of R. O. Barrett, the purchaser at the Sheriff's sale.

An appeal was taken from this judgment to the Supreme Court of Arizona, and on November 28, 1938, the judgment was reversed. In its decision the Supreme Court held that the trial court exceeded its power in declaring that the attachment levy on the mortgage gave the plaintiff a lien on it or on the realty covered by it, for the reason that the procedure to procure the lien was sanctioned neither by the common law nor by statute, and that the order foreclosing the lien and sale were null and void and of no effect. [16]

Thereafter, in February, 1939, A. H. Favour and A. G. Baker, as assignees of the judgment of Mrs. Margaret Cobb in Cause No. 12971, petitioned the Superior Court in which the case was tried for an order in accordance with Section 3854, Revised Code of Arizona, 1928, directing that the record be made to conform to the decision of the Supreme

Court of November 28, 1938. The petition was granted, and the Superior Court on September 28, 1939, entered the following order:

“The decision of November 28, 1938, of the Supreme Court, on appeal in Cause No. 13722 in this Court, having held that the foreclosure of attachment in the judgment in this cause dated April 18, 1934, was void, and the proceedings taken under said foreclosure being therefore void and of no effect, it is ordered pursuant to the authority of Section 3854 that the record be, and the same is hereby corrected herein to conform to said decision, and all proceedings, and the record of all proceedings, subsequent to the judgment of April 18, 1934, including the special execution and all proceedings and acts therein, thereunder, and thereafter taken or done, are and are hereby declared void by and under said decision of the Supreme Court, and are of no force or effect; the judgment of April 18, 1934, to otherwise remain in effect except as so modified or changed by said decision of November 28, 1938, of the Supreme Court of Arizona.” [17]

The contract upon which the judgment of Margaret Cobb is based was entered into by and between Margaret Cobb and the Intermountain Building & Loan Association under which Margaret Cobb paid to the Association the sum of \$693.00 in one hun-

dred twenty-six installments of \$5.50, with the express understanding and agreement that when all of said instalments had been paid in full the Association would pay to her the sum of \$1,000.00. When the certificate matured the Association refused or was unable to pay the amount due, but did agree that after claims filed previous to that of Margaret Cobb had been paid, and when sufficient funds were available for that purpose, the claim of Margaret Cobb would be paid. This arrangement not being satisfactory to Mrs. Cobb, she commenced the action above mentioned and the contract upon which her claim was based was converted into the judgment of April 18, 1934.

By reason of the proceedings herein described the Association has paid nothing to Margaret Cobb or any assignee of hers on account of the certificate and the Receiver has refused to allow the claim on the judgment, for the reason that it appears to have been satisfied by the Sheriff's sale held pursuant to the execution issued on the judgment of Margaret Cobb. It further appears that R. O. Barrett received from Favour & Baker an amount equal to the sum he paid to the Sheriff for the Sheriff's certificate of sale, later declared by the Supreme Court to be void." (Page 47) [18]

Conclusions of Law:

XVI. (Page 62)

The action of the Receiver rejecting the claim of Messrs. Favour and Baker as assignees of the

judgment obtained by Margaret Cobb against the Intermountain Building & Loan Association in the Superior Court of Yavapai County, Arizona, on the 18th day of April, 1934, is approved.

In view of the fact that this claim has been the subject of considerable litigation and its proponents have been diligent in presenting their objections to the Receiver's ruling, it is only fair that the Master's reasons for sustaining the Receiver should be briefly stated. Favour & Baker, as the assignees of Margaret Cobb, have exactly the same rights that she assigned to R. O. Barrett, and that he in turn assigned to Messrs. Favour & Baker. If Margaret Cobb, assuming she had made no assignment, is entitled to recover from the Association, so are Favour & Baker, her *assignees*. If she could not recover, neither can her assignees.

The judgment secured by Margaret Cobb against the Association on the 18th day of April, 1934, was valid insofar as it established her right to recover from the Association the amount she sued for. During the pendency of the action a writ of attachment was issued under which the sheriff attempted to levy upon a mortgage given by residents of Yavapai County on property in Yavapai County, to secure an indebtedness of the mortgagors to the Intermountain Building & Loan [119] Association. The judgment directed that the attachment lien on the mortgage be foreclosed. Pursuant to the judgment, a special execution was issued directing the Sheriff to sell the attached mortgage. This the Sheriff ac-

cordingly proceeded to do. The sale, after due notice, was held on the 30th day of April. The highest and best bid was that of R. O. Barrett for \$1064.06. Barrett paid the amount of his bid to the Sheriff in cash. The Sheriff thereupon paid the money over to the attorneys for Margaret Cobb, and took from them a receipt which recited that the money was received and accepted in full payment and satisfaction of the judgment. Later the Supreme Court of Arizona held that the Sheriff's levy on the mortgage under the writ of attachment was a nullity; and that the judgment order foreclosing the attachment lien was void, and that the special execution and sheriff's sale and certificate of sale were likewise void. Even though the certificate of sale that the Sheriff delivered to Barrett was worthless and the proceedings upon which it was based were void, the Sheriff nevertheless received for it \$1064.06, and this sum the Sheriff paid to Margaret Cobb's attorneys and they received it in full payment and satisfaction of the judgment. It is not necessary that an execution issue, or that there be a valid sale in order to satisfy a judgment. If the judgment creditor is paid in full, the judgment is satisfied. Margaret Cobb was paid in full on April 30, 1934, since which time she has had no claim against [20] the Association. Seventeen days later Margaret Cobb made an assignment to R. O. Barrett of "all benefit and the advantage of the said judgment * * * and all moneys recoverable under the judgment". Evidently Margaret Cobb had much faith in the durability and

virtue of her judgment, but it is a faith that we do not share. She had nothing to assign, and her assignees acquired nothing. One could feel considerable sympathy for Mr. Barrett, save for the fact that he sold whatever he acquired by Mrs. Cobb's assignment to Messrs. Favour & Baker for a consideration equal to the amount he paid the Sheriff for the impotent certificate of sale. It is obvious that Messrs. Favour & Baker have provided the money that satisfied their client's judgment, with the result that the Association has been relieved of a corresponding liability without cost, other than the expense incidental to protracted litigation. It may well be that Messrs. Favour & Baker, on some theory, have a just claim against the Association for reimbursement. It must rest, however, on something other than the vitality of the judgment of Margaret Cobb." (Page 65). [21]

[Endorsed]: Report of Special Master. Filed Dec. 14, 1940. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [22]

[Title of District Court and Cause.]

EXCEPTIONS TO REJECTION BY SPECIAL
MASTER OF CLAIM OF A. H. FAVOUR
AND A. G. BAKER

Come now the above named claimants, by their attorneys, and upon the following, and such other, grounds as may be presented at the hearing, except

to that part of the Report of the Special Master, filed December 14th, 1940, which rejects their claim for \$1064.06, or any part thereof, although the Special Master in so rejecting states in substance that these claimants may well have a just claim against the Intermountain Building & Loan Association:

1. The disallowance of the claim upon the ground that the return of the Sheriff indicating satisfaction stands as conclusive even when the sale is declared void, would be erroneous and contrary to equity and decisions, for the reason that when a sale is void, any satisfaction based thereon is also void; and the record which has been submitted with this claim shows that the execution, sale, and all proceedings thereafter, including the apparent satisfaction in the Cobb case, were declared void by the Supreme Court and an order conforming thereto was entered by the trial Court. Any satisfaction based upon such void proceedings would likewise be void. There was, in law, no levy, no sale, and no satisfaction; hence the debt is still due.

2. The disallowance of the claim by the Court will result in injustice and inequity, for the reason [23] that, as reported by the Special Master, the Intermountain was paid in full for the Certificate, and no payment whatsoever has ever been returned by said Association to Margaret Cobb, the payor, or to any person for her, or to her assigns, these claimants, who paid to Margaret Cobb the full sum of \$1064.06 for the assignment of her judgment and claim and interest to them, and who are the losers and real parties in interest.

The Special Master, in his Report, recognizes that these claimants have a just claim for reimbursement on some basis, and these claimants pray that this Court do equity in accordance with said recognition and as the case so admittedly calls for.

FAVOUR, BAKER & CRAWFORD,
By ALPHEUS L. FAVOUR,
Attorneys for Claimants.

State of Arizona,
County of Yavapai—ss.

A. G. Baker, being first duly sworn, deposes and says:

That he is one of the claimants above named; that he has read the foregoing Exceptions, and that the matters stated therein are, to his knowledge or in his belief, true in substance and in fact.

A. G. BAKER

Subscribed and sworn to before me this 23rd day of December, A. D. 1940.

[Seal] VERA VOGEL,
Notary Public.

My Commission expires September 7th, 1943. [24]

[Endorsed]: Filed Dec. 26, 1940. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [25]

In the United States District Court
for the District of Arizona

October 1940 Term

At Phoenix

MINUTE ENTRY OF
MONDAY, JANUARY 20, 1941
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding

E-268

GUADALUPE R. GALLEGOS, et al,
Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN AS-
SOCIATION, a corporation,
Defendant.

This case comes on regularly before the Court this day for hearing on the Report of Special Master and Exceptions to Report of Special Master filed by A. H. Favour and A. G. Baker, and by Mathilda J. Forst.

The Receiver, Harry W. Hill, is present with his counsel, Lawrence L. Howe, Esquire. Thomas W. Nealon, Esquire, and Charles Rawlins, Esquire, are present in their own behalf. J. H. Morrison, Esquire, appears as counsel for creditor, Southwestern Fire Insurance Company. E. O. Phlegar, Esquire, appears as counsel for claimant, Mathilda J. Forst, Alpheus L. Favour, Esquire, and A. G.

Baker, Esquire, appear as counsel for Claimants A. H. Favour and A. G. Baker. Ralph Stewart, Esquire, appears as counsel for the Ancillary Receiver in Utah. M. L. Ollerton, Esquire, appears as counsel for certain certificate holders in Utah and moves for continuance of this hearing to permit exceptions to be filed on behalf of said certificate holders, and

It Is Ordered that said motion be, and it is denied.

The said exceptions of A. H. Favour and A. G. Baker are now duly argued by respective counsel, submitted, and by the Court taken under advisement.

Said exceptions of Mathilda J. Forst are now submitted on briefs and by the Court taken under advisement. [26]

Ralph Stewart, Esquire, now makes statement to the Court on behalf of the Ancillary Receiver in Utah and

It Is Ordered that said Report of Special Master be submitted and by the Court taken under advisement. [27]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard upon exceptions to the master's report filed therein, and was argued by counsel, and thereupon, upon consideration

thereof, it is Ordered, Adjudged and Decreed, as follows:

1. The exceptions of Mathilda J. Forst and A. H. Favour and A. S. Baker are overruled.

2. The special master, Paragraph IX, page 57 of his report, recommends that in the distribution of the assets of defendant, certificate owners who have borrowed from the Association, and pledged their certificates as security, be allowed the adjusted value as an offset against their indebtedness, and that they be paid as other creditors on any credit balance.

Owing to the high regard for the master's ability as a lawyer, it is with diffidence I hold that this view does not commend itself to the Court, First, because apparently the Association was insolvent, even from its inception. Secondly, because the Association, having been incorporated under the laws of Utah, it would appear that the law of that State should control in determining the relative rights of borrowing and non-borrowing certificate-holders. Both of the foregoing conclusions are supported by ample authority.

The receiver, therefore, will disregard the master's suggestion and will make distribution in accordance with the Utah statute which disallows offsets of the character under discussion.

Except as indicated, the report of the special master hereby is confirmed and approved.

Dated at Phoenix, Arizona, this 30th day of January, 1941.

DAVE W. LING
Judge [28]

[Endorsed]: Filed Jan. 30, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [29]

[Title of District Court and Cause.]

PETITION OF CLAIMANTS, A. H. FAVOUR
AND A. G. BAKER FOR REHEARING

Come now A. H. Favour and A. G. Baker, claimants whose claim was rejected, and petition the Court to set aside that portion of the order of January 30th, 1941 herein, which overrules the exceptions of A. H. Favour and A. G. Baker to the report of the Master which denied their claim, and to re-open the case as it affects this claim, upon the following grounds, to wit:

I.

No specific findings were made on disputed matters arising on the objections and exceptions of these claimants to the Master's report, and claimants cannot tell upon what points or findings the Court based its order overruling the exceptions, as is required by practice and the decisions on such cases.

2. That the Property Settlement Agreement changed the status of income earned by Petitioner subsequent to the date thereof from community earnings to separate earnings of Petitioner.

III.

Assignment of Errors.

In making its decisions, as aforesaid, the United States Board of Tax Appeals committed the following errors upon which your Petitioner relies as the basis of this proceeding:

1. The Board of Tax Appeals erred in holding that the income of Petitioner from his personal services for that part of the year 1936 commencing September 1 and ending December 31, and his income from his personal services for that part of the year 1937 commencing January 1 and ending October 1, was taxable entirely to Petitioner as his sole and separate property.

2. The Board of Tax Appeals erred in holding that the Property Settlement Agreement entered into by Petitioner and his then wife, Gertrude Martha Somerville, had the effect of changing the status of his subsequent earnings from community earnings to separate earnings.

Wherefore, your Petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same, and direct the said Board of Tax Appeals to hold and determine that the income of Petitioner for all of the year 1936

and that part of the year 1937 commencing January 1 and ending October 1 was community property of Petitioner and his then wife, Gertrude Martha Somerville, taxable one-half to each of said parties; and for the entry of further orders and direc- [22] tions as shall be deemed meet and proper in accordance with law.

EDWARD L. CONROY
DON CONROY

Attorneys for Petitioner
501 Taft Building
Los Angeles, California

State of California,
County of Los Angeles—ss.

Edward L. Conroy, being duly sworn, says:

I am one of the attorneys for the Petitioner in this proceeding. I prepared the foregoing petition and I am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This Petition is not filed for the purpose of delay, and I believe that the Petitioner is fully entitled to the relief sought.

EDWARD L. CONROY

Subscribed and sworn to before me this 29 day of May, 1941.

H. G. LYMAN

Notary Public in and for said County and State.

[Endorsed]: U. S. B. T. A. Filed June 3, 1941.

[Title of Board and Cause.]

To:

Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

J. P. Wenchel, Attorney for Respondent,
Chief Counsel, Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You are Hereby Notified that on the 3rd day of June, 1941, a Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals, heretofore rendered in the above entitled cause, was filed with the Clerk of the Board. A copy of the Petition as filed is attached hereto and served upon you.

Dated: June 2, 1941.

EDWARD L. CONROY
DON CONROY

Attorneys for Petitioner
501 Taft Building
Los Angeles, California [24]

Service of the foregoing Notice of Filing and of a copy of the Petition for Review is hereby acknowledged this 3rd day of June, 1941.

J. P. WENCHEL

Chief Counsel
Bureau of Internal Revenue
Attorney for Respondent

[Endorsed]: U. S. B. T. A. Filed June 3, 1941.

[25]

[Title of Board and Cause.]

STATEMENT OF EVIDENCE

The above entitled cause came on for hearing at Los Angeles, California, before the Honorable Eugene Black, a member of the United States Board of Tax Appeals, on the 10th day of June, 1940, Edward L. Conroy, Esq., appearing on behalf of Petitioner, and E. A. Tonjes, Esq., appearing on behalf of Respondent.

Thereupon the parties, by their respective attorneys, filed with the Board a written Stipulation theretofore entered into by their counsel, and the cause was submitted upon the facts set forth in said Stipulation. By said Stipulation the parties agreed:

That Petitioner and Gertrude Martha Somerville were husband and wife for several years prior to 1936 and on September 28, 1936, an Interlocutory Judgment of Divorce was entered in the Superior Court of the State of California, in and for the County of [26] Los Angeles, in which proceedings Gertrude Martha Somerville was plaintiff and Petitioner was defendant, and a true copy of said Interlocutory Judgment of Divorce is attached to said Stipulation, marked Exhibit "A" and by such reference made a part thereof; that on October 2, 1937, a Final Judgment of Divorce was entered in said divorce proceedings between Petitioner and his said wife, Gertrude Martha Somerville, and a true copy of said Final Judgment of Divorce is attached to

Master rejecting said claim. These claimants, Favour & Baker, appeal from the denial of the petition for rehearing filed by these appellants on [33] February 6th, 1941, and overruled on February 17th, 1941, and from any intermediate order necessarily affecting the final rejection of said claim.

FAVOUR, BAKER & CRAWFORD,
By A. G. BAKER,

Attorneys for Appellants,

A. H. Favour and A. G. Baker.

The Bank of Arizona Building,
Prescott, Arizona.

[Endorsed]: Filed Apr. 14, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [34]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Favour & Baker, by A. G. Baker, and A. G. Baker, as Principals, and Globe Indemnity Company, a Corporation, as Surety, are held and firmly bound unto Harry W. Hill, Receiver of Intermountain & Loan Association, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Harry W. Hill, Receiver, and his successors and assigns, for which payment, we bind ourselves, and our heirs, executors, administrators, successors and assigns, jointly and severally.

Signed and executed this 10th day of April, A. D. 1941. [35]

Whereas, on January 30th, 1941, in the above entitled Court and cause, final order was rendered against the said A. H. Favour and A. G. Baker, claimants, and on February 17th, 1941, petition for rehearing was denied, and said claimants have duly filed notice of appeal therefrom.

Now, the condition of this obligation is such that if the said claimants shall prosecute said appeal with effect and pay all costs if the appeal is dismissed or the order or judgment affirmed, or such costs as the appellate court may award, if the order or judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

FAVOUR & BAKER, and A. G. BAKER,
By A. G. BAKER,

Principals.

[Seal] GLOBE INDEMNITY COMPANY,
By P. G. PRITCHARD,
Surety.

[Endorsed]: Filed Apr. 14, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [36]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO BE CONTAINED IN RECORD ON
APPEAL

Appellants designate the following portions of the record in this action to be contained in the record on appeal from rejection of their claim:

1. Notice of Appeal.
2. Statement of Points on which Appellants intend to rely.
3. This designation.
4. Portion of "Report of Special Master" relating to Judgment Claim of Favour & Baker (pages 41 to 47) and Conclusions of Law (page 62). Filed December 14, 1940.
5. Exceptions to Rejection by Special Master in his Report of the claim of Favour & Baker. Filed December 26, 1940.
6. Order of Court of January 30, 1941, overruling Exceptions and confirming Report of Special Master.
7. Petition for Rehearing of Favour & Baker. Filed February 7, 1941.
8. Order of Court denying Petition for Rehearing, made February 17, 1941.

(The appeal is that the findings of facts do not support the conclusion of law that the claim was satisfied by the sheriff's sale, afterwards held void. The only essential record under Rule 75 (e) consists of the findings and conclusions of the Special Master and the proceedings thereafter. The record prior

to his Report does not appear essential under the Rules requiring brevity, but the following portions are included as perhaps proper and useful)

9. Minute Order of September 16, 1940, referring claims to the Special Master.

10. Notice given by Special Master to Creditors, following said Order, of reference of claims to him and providing for written objections by mail to disallowance by Receiver.

11. Claim of Favour & Baker so referred to Special Master by Court Order, and reported to the Court in said "Report of Special Master." [37]

12. Motion that Master Approve Judgment Claim of Favour & Baker, Exceptions to Report of Receiver. Filed September 27, 1940.

13. Bond on Appeal.

FAVOUR, BAKER & CRAWFORD,
By A. G. BAKER,

Attorneys for Appellants.

A. H. FAVOUR and A. G. BAKER,
The Bank of Arizona Building,
Prescott, Arizona.

Dated April 16, 1941. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

The appellants, in accordance with the requirement where the whole record of a case is not nec-

essary, state that the points upon which they intend to rely on the appeal, as is shown by and may be determined from the record, are as follows:

1. There is no dispute on the facts. The Special Master found them in his report, which the Court confirmed; and appellants accept these as conclusive. The ground of appeal is that the conclusion of law and decision rejecting the claim filed with the Receiver is erroneous.

These facts show that originally Cobb held a fully paid \$1,000.00 certificate in the Intermountain Association. In 1934, before appointment of a receiver, Cobb brought suit in the State Court to enforce payment. A mortgage in which Intermountain Association was mortgagee was attached. Judgment was rendered for Cobb and for foreclosure of the attachment. On the sale Barrett bought. The return of the Sheriff showed the usual receipt signed in satisfaction. Favour & Baker later bought from Barrett for the full sum. Later, in another suit the Arizona Supreme Court held the attachment void, thus returning to Intermountain the property that had been bought on the sale. Favour & Baker then filed claim with this Receiver, based on the said judgment establishing the amount due. They claimed as assignees subrogated to the right to receive the debt due from Intermountain which had received full payment and had parted with nothing. The Special Master points this out; he states that the Receiver refused to allow the

claim "for the reason that it appears to have been satisfied by the Sheriff's sale". [39]

This conclusion of law was adopted by the Court, and by the Special Master, although the latter indicated that the claimants might have a just claim. It is from the conclusion of law, that the claim was satisfied by the Sheriff's sale, that appellants appeal, and further assign as errors of the lower Court:

2. The Court erred, upon the facts found by the Special Master, in confirming, over objection, his conclusions of law and decision, and in rendering judgment, rejecting the claim.

3. The facts found by the Special Master are not sufficient to support the final order of the Court of January 30th, 1941, confirming his conclusion of law that the claim was satisfied by reason of the Sheriff's sale and return, and approving his rejection of the claim; and said order is contrary to the facts found.

FAVOUR, BAKER &
CRAWFORD,

By A. G. BAKER

Attorneys for Appellants,
A. H. Favour and A. G. Baker.
The Bank of Arizona Building,
Prescott, Arizona.

[Endorsed]: Filed Apr. 17, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Arizona,
County of Yavapai—ss.

A. G. Baker, being first duly sworn, on oath, deposes and says:

That on April 16th, 1941, true and correct copies of "Designation of Portion of Record to be Contained in Record on Appeal", and "Statement of Points on Which Appellants Intend to Rely," in the above entitled cause, were mailed at the United States Post Office, in Prescott, Arizona, to Messrs. Baker & Whitney, the attorneys for the Receiver, Harry W. Hill, in said cause; that said copies were enclosed in an envelope, and the envelope was sealed; that said envelope was addressed to said attorneys at their office address, to-wit: Luhrs Tower, Phoenix, Arizona; and that the postage thereon was fully prepaid.

A. G. BAKER

Subscribed and sworn to before me this 30th day of April, A. D. 1941.

[Seal] VERA VOGUE
Notary Public

My commission expires September 7th, 1943. [41]

[Endorsed]: Filed May 1, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [42]

APPELLANTS' SUPPLEMENTAL
DESIGNATION

Law Offices of
Favour, Baker & Crawford
Prescott, Arizona

June 3, 1941.

Alpheus H. Favour, 1880-1939

Arthur G. Baker

Albert M. Crawford

Alpheus L. Favour

Mr. Edward W. Scruggs, Clerk

U. S. District Court, Phoenix, Arizona

Dear Sir:

E-268 Phx. Gallegos v Intermountain

Replying to your letter of May 27th, we have been looking up the situation where for some reason the Clerk cannot send up some part of matters that may be part of the record on appeal. From what we have found it would seem that where *where* some document which the clerk is directed by rule to include, or some paper designated by appellant, cannot be sent, the clerk may state the nature of the omitted part and that it cannot be sent.

So it would be our suggestion that in place where item 10, the notice of Special Master, would come, you might state substantially:

1. The appellants, as No. 10 in their Designation of portions of the Record, request the inclusion of the Notice Given by the Special Master to

Creditors, providing for written objections by mail to disallowances by the Receiver.

This request cannot be complied with for the reason that a form of such Notice was never filed by the Special Master on this Office. However, the Report of said Master filed herein, states the following method and manner in which notice was given:

(Then insert quotation you mention on page 2).

2. The appellants as No. 11 in their said Designation, request the inclusion of the Claim of Favour & Baker, so referred to the Special Master by Court Order, and reported to the Court in the Report of Special Master, a part of this record.

This request cannot be complied with because [43] the claim is not on file in this Office, for the reason that the Court Order of May 22, 1936, and later orders enlarging the time for filing of claims, directs that claims be filed with the Receiver. However, the Receiver in his petition to the Court to determine preferences and priorities states the following on the claim:

(Then insert quote you mention as on pp. 7 & 8).

We do not believe these items are necessary; however, the appellate court might think differently, and if they are included in our Designation, and you give the reason for not being able to comply, the appellate court can, as we read the rules and decisions, order them up if necessary.

Your method of certification appears to comply with Rule 75 (g).

Thanking you,

We remain,

Respectfully yours,

FAVOUR, BAKER &
CRAWFORD

AGB

[Endorsed]: Filed Jun. 4, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [44]

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of Guadalupe R. Gallegos, et al, plaintiffs, versus Intermountain Building and Loan Association, a corporation, defendant, numbered E-268 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 44, inclusive, contain a full, true and

correct transcript of the proceedings in said cause, and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellants' Designation of Portions of Record to be Contained in Record on Appeal, and Appellants' Supplemental Designation, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, with the exception of items numbered 10 and 11 referred to in said Designation, being Notice Given by Special Master to Creditors, and Claim of Favour & Baker, which are not included in said transcript for the reason that I fail to find the same among the papers filed in my office.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$6.00 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 9th day of June, 1941.

[Seal]

EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS

Chief Deputy Clerk. [45]

[Endorsed]: No. 9847. United States Circuit Court of Appeals for the Ninth Circuit. A. H. Favour and A. G. Baker, Appellants, vs. Harry W. Hill, Receiver of Intermountain Building and Loan Association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed June 18, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9847

A. H. FAVOUR and A. G. BAKER,
Appellants,

vs.

HARRY W. HILL, RECEIVER OF INTER-
MOUNTAIN BUILDING & LOAN ASSO-
CIATION,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

Come now the Appellants, and state that they hereby adopt as their points on appeal the state-

ment of points on appeal appearing in the transcript of record in this case.

Dated this 23rd day of June, 1941.

FAVOUR, BAKER &
CRAWFORD

Attorneys for Appellants.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE OF STATEMENT
OF POINTS ON WHICH APPELLANTS
INTEND TO RELY.

State of Arizona,
County of Yavapai—ss.

A. G. Baker, being first duly sworn, on oath, deposes and says:

That on the 23rd day of June, 1941, he mailed a copy of "Statement of Points on Which Appellants Intend to Rely", in the above entitled matter, to Messrs. Baker & Whitney, Attorneys at Law, Luhrs Tower, Phoenix, Arizona; that said copy was placed in a sealed envelope, addressed as above, with postage thereon fully prepaid.

A. G. BAKER

Subscribed and sworn to before me this 23rd day of June, 1941.

[Seal] VERA VOGUE
Notary Public.

My commission expires September 7th, 1943.

[Endorsed]: Filed June 25, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

Come now the Appellants and designate for printing the entire transcript, except any formal portions or rearrangement for printing that the Clerk may change or require under the rules and custom.

Dated this 23rd day of June, 1941.

FAVOUR, BAKER &
CRAWFORD

Attorneys for Appellants.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE OF DESIGNATION
OF RECORD FOR PRINTING

State of Arizona,
County of Yavapai—ss.

A. G. Baker, being first duly sworn, on oath,
deposes and says:

That on the 23rd day of June, 1941, he mailed
a copy of "Designation of Record for Printing",
in the above entitled matter, to Messrs. Baker &
Whitney, Attorneys at Law, Luhrs Tower, Phoenix,
Arizona; that said copy was placed in a sealed
envelope, addressed as above, with postage thereon
fully prepaid.

A. G. BAKER

Subscribed and sworn to before me this 23rd
day of June, 1941.

[Seal]

VERA VOGUE

Notary Public.

My commission expires September 7th, 1943.

[Endorsed]: Filed June 25, 1941. Paul P.
O'Brien, Clerk.